SUPREME COURT, U. S.

No. 478

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In the Supreme Court of the United States

OCTOBER TERM, 1968

JEREMIAH STAMLER, M.D. and YOLANDA F. HALL,

Plaintiffs-Appellants,

and

MILTON M. COHEN,

Intervening Plaintiff-Appellant,

vs.

HON. EDWIN E. WILLIS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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On Appeal from the United States District Court
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JURISDICTIONAL STATEMENT

Plaintiffs-appellants Jeremiah Stamler, M.D. and Yolanda F. Hall appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 26, 1968.

Opinions Below

The opinions of the District Court, majority and dissenting, not yet reported, are attached as Appendix 1, and a copy of the judgment from which this appeal is taken is attached as Appendix 2.

Jurisdiction

This appeal involves two actions which were consolidated by order of the District Court. The first case was filed on May 24, 1965, the day before appellants were to appear pursuant to subpoenaes before a sub-committee of the United States House of Representatives Committee on Un-American Activities (the "Committee") in Chicago, Illinois. The second case was filed in December, 1965, after the Committee's hearings in Chicago were concluded. Both cases were brought by plaintiffs-appellants in the United States District Court for the Northern District of Illinois, Eastern Division, under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2202, 2282, 2284; 42 U.S.C. §1983; and under the Constitution of the United States (Article I, Section 9, Clause 3; Article III; and the First, Fifth, Ninth, Tenth and Fourteenth Amendments).

The original defendants in both cases were the Chairman and the members of the Committee ("the Congressional appellees" or "the Committee members"). The Attorney General of the United States and the United States Attorney for the Northern District of Illinois ("the prosecutors") were subsequently added as parties defendant.

Insofar as pertinent to this appeal, appellants sought (1) a declaratory judgment that the Act of Congress which established the Committee (Rule XI, 18(b), Legislative Reorganization Act of 1946, 60 Stat. 812, 828) is repugnant to the United States Constitution, (2) an injunction prohibiting the Congressional appellees from acting under or

enforcing that Act, and (3) an injunction prohibiting the prosecutors from proceeding with prosecution of indictments obtained by them against appellants for alleged contempt of Congress arising out of the 1965 Chicago hearings.

With one Judge dissenting, the District Court entered on June 26, 1968 its judgment dismissing the consolidated cases as to all appellees. Notice of appeal was filed by appellants on July 5, 1968. By order entered August 30, 1968, the time to docket this appeal was extended to September 5, 1968.

Jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. §1253. The following cases sustain the jurisdiction of this Court: *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947); *United States* v. *Georgia Public Service Commission,* 371 U.S. 285 (1963).

Constitutional Provisions and Statutes Involved

Article I, Section 6, Clause 1 of the United States Constitution provides in part:

> "... and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Article I, Section 9, Clause 3 of the United States Constitution provides in part:

> "No Bill of Attainder . . . shall be passed."

The enabling Act of the United States House of Representatives Committee on Un-American Activities is a part of the Legislative Reorganization Act of 1946. (60 Stat. 812, 828.) Rule XI, 18(b) of the Act provides as follows:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of Un-American propaganda activities in the United States, (ii) the diffusion within the United

States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Questions Presented

1. Whether a complaint seeking declaratory and injunctive relief against an unconstitutional act of Congress may be dismissed as against the United States Attorney and the Attorney General merely because Congressional-defendants have asserted a claim of immunity under the Speech or Debate Clause and where concededly the prosecutor-defendants have no such claim of immunity and are otherwise proper parties to the action?

2. Whether the Speech or Debate Clause prohibits civil actions against members of Congress to adjudicate the constitutionality of federal legislation?

3. Even if the Speech or Debate Clause is applicable to the relief sought in this proceeding, whether summary judgment may be granted against appellants when a clear issue of fact exists as to whether the activities of the Congressional appellees were legitimate legislative activities?

4. Whether the failure of the Congressional defendants to assert the Speech or Debate Clause as a bar to this action until April, 1968 has resulted in a waiver of any rights or privileges afforded them by that Clause?

5. Even if the Speech or Debate Clause is applicable to the relief sought in this proceeding, whether summary judgment may be granted against the appellants without affording them an opportunity to contest factually the asumption that the Congressional appellees were engaged in legitimate legislative activity?

6. Whether the statutory mandate establishing the Committee on Un-American Activities of the House of Representatives is on its face repugnant to the Constitution of the United States?

STATEMENT OF THE PROCEEDINGS BELOW*

Plaintiffs Jeremiah Stamler, M.D. and Yolanda F. Hall and intervening plaintiff Milton M. Cohen (hereinafter ("appellants")** were subpoenaed to appear before a subcommittee of the United States House of Representatives Committee on Un-American Activities (hereinafter "the Committee") to be held in Chicago, Illinois commencing May 25, 1965. A letter accompanying each subpoena stated that the Committee had received evidence in executive session in which the person subpoenaed was identified as having been a member of the Communist Party. (2 A. 53-54.) Appellants received no information regarding the purpose or subject matter of the hearings.

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* "1 A ——" refers to the Appendix filed in the Court of Appeals for the Seventh Circuit in No. 15268-9; "2 A. ——" refers to the Appendix filed in Nos. 15268-9 and 15668-9 (Consolidated); "Ex. 50, p. ——" and "Ex. 51, p. ——" refer to the printed Supplemental Appendices filed in the consolidated appeals; "— R. ....." refers to the volume and item number of the five volume Record on Appeal filed in this Court.

** Appellant Stamler has long enjoyed a world-wide reputation for his professional research and writings on prevention of heart disease. He is Director of the Chicago Board of Health Division of Adult Health and Aging and Heart Disease Control Program. He was placed upon inactive status the day after he was indicted for contempt of Congress in July 1967. Since 1958 Dr. Stamler has been on the faculty of the Department of Medicine, Northwestern University Medical School, Chicago, and currently nolds the rank of Associate Professor. He is Secretary of the Council on Epidemiology and Prevention of the International Society of Cardiology, and Western Hemisphere Editor of the Journal of Atherosclerosis Research. (1 A. 2-3; 2 A. 3-4.)

Appellant Hall is a Research Nutritionist for the Chicago Health Research Foundation, of which Dr. Stamler is the Executive Director. (1 A. 3; 2 A. 4.)

Intervening appellant Cohen is Executive Director of a home for the aged, a not-for-profit corporation operated in conjunction with the Jewish Federation of Metropolitan Chicago. (2 A. 87.)

Appellants' First Action

On May 24, 1965, the day before the Committee hearings were to commence, appellants instituted an action against the Chairman and members of the Committee in the District Court in Chicago in which they sought (i) a declaratory judgment that the Act of Congress (Rule XI) that established the Committee is repugnant to the United States Constitution, (ii) an injunction restraining enforcement of that Act and (iii) an injunction restraining the holding of the scheduled hearings in Chicago. (1 A. 2-14, 38-39; 1 R. 2, pp. 5-55.)

The same day, after oral arguments were heard, the District Judge (Honorable Julius J. Hoffman) dismissed the action pursuant to the Committee's oral motion on the ground that the complaints raised no substantial question of federal law, relying primarily on *Barenblatt* v. *United States,* 360 U.S. 109 (1959). Appellants thereupon appealed to the Court of Appeals for the Seventh Circuit. (1 A. 41-52).

The Hearings

Pursuant to the subpoenas served upon them, appellants and their counsel attended the hearings on May 25, 26 and 27, 1965. The first two witnesses were the Committee's own witnesses ("friendly" witnesses). They testified at length concerning alleged activities of the Communist Party in the Chicago area, particularly among steel mill workers during the 1930's through the 1950's. The Committee had already heard this testimony in executive session.* Neither of the Commttee's witnesses mentioned either Dr. Stamler or Mrs. Hall. The Committee then called the subpoenaed witnesses, reserving Dr. Stamler and Mrs.

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* Both witnesses were undercover FBI agents who infiltrated the Communist Party. Both left the Party in 1963. One had testified before the Subversive Activities Control Board in 1963. (Ex. 50, pp. 301-307; 333, 388.)

Hall until last. All of the subpoenaed witnesses other than appellants refused to answer any except a few preliminary questions. They based their refusals upon multiple grounds including, in every instance, the Fifth Amendment privilege against self incrimination. Nevertheless, Committee counsel put to each of these witnesses a long series of defamatory, leading, "fact"-laden questions. In many instances, over objection of appellants' counsel, Committee counsel asserted as a part of his questions that the Committee had information, which it deemed "reliable," that Dr. Stamler and Mrs. Hall had been members of the Communist Party and had engaged in "subversive" activities.*

The Committee denied or disregarded the objections and protests of appellants' counsel that this deliberately pursued practice impaired the rights of the appellants and the witnesses under the Constitution of the United States, was a gross abuse of the legislative process, was a delib-

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* For example:

"Now, further, in light of the fact that Mrs. Yolanda Hall in the year 1949 was here in Chicago as an admitted Communist—." [Interrupted by objections and colloquy.] (Ex. 50, p. 432.)

"The committee also possesses information, which it believes reliable, that you and Dr. Jeremiah Stamler also were in attendance at a conference held on October 16-17, 1953, titled 'The Chicago Area Conference for World Peace Through Negotiations,' which was held under the auspices of the American Peace Crusade at the Fine Arts Building, Curtis Hall, 410 South Michigan Avenue, Chicago, Illinois. Did you meet or talk with Dr. Stamler on these occasions?" (Ex. 50, p. 508.)

"The committee is informed that, at the time [late 1950] you were contacted by Dr. Stamler you were advised by him that you were one of several persons chosen to give up their identity and to move to new areas to carry on in case Communist Party leaders were put away. Did he tell you that?" (Ex. 50, pp. 534-535.)

See also Ex. 50, pp. 430, 432, 507-8, 511, 524-5, 534.

erate pillorying of appellants and the witnesses, was unsworn accusatory "testimony" of Committee counsel, was gross hearsay, and was for the sole purpose of holding the witnesses and appellants up to public ridicule and defamation.

The Committee also denied the repeated requests of appellants' counsel that all testimony of or concerning appellants be taken in executive session, pursuant to Rule 26(m) of the rules of the House of Representatives.* The hearing room was at all times jammed with spectators, television cameras and operators, news-cameramen, news reporters, and a squadron of marshals.

Mrs. Hall was called to testify on the last day of the hearings. She had not been mentioned in the testimony of any witness. Immediately after being sworn and giving her name, her counsel made a statement to the Committee setting forth the various violations of the United States Constitution and Committee rules which impelled him to advise Dr. Stamler and Mrs. Hall to leave the hearings without further ado. Upon advice of counsel, Mrs. Hall thereupon left the hearing room. (Ex. 50, pp. 537 to 547.)

The Committee then recalled one of its friendly witnesses who, though he testified he had never met Dr. Stamler, was

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*Committee Rule 26(m) provides:

"If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—

"(1) receive such evidence or testimony in executive session;

"(2) afford such person an opportunity voluntarily to appear as a witness; and

"(3) receive and dispose of requests from such person to subpoena additional witnesses."

One of appellants' counsel (Thomas P. Sullivan) orally requested executive sessions and was forcibly seized and thrust down into a chair by marshals at the Chairman's direction. Another of appellants' counsel (Albert E. Jenner, Jr.) was threatened with bodily removal from the hearing room. (Ex. 50, pp. 430-2, 548.)

permitted (over objections) to testify to a derogatory hearsay statement about Dr. Stamler which the witness allegedly overheard in 1959. The Committee denied the request of Dr. Stamler's counsel to cross examine the Committee's witnesses. Dr. Stamler was then called as a witness. After being sworn, upon advice of counsel, he took the same position as had Mrs. Hall, and left the hearing room. (Ex. 50, pp. 549 to 552.)

Appellants' Second Action

Following the hearings, appellants commenced a second action in the District Court against the Committee, in which appellants set forth what had transpired at the hearings. The official printed transcript of the hearings was attached as an exhibit to the complaint. (2 A. 3-83.) In substance the complaint alleged that the misconduct on the part of the Committee, which appellants had anticipated, had in fact taken place; that the course pursued by the Committee at the Chicago hearing was in the pattern of all prior hearings over the years; that the Committee had consistently interpreted Rule XI to authorize that conduct; and that the Committee was engaged in public pillorying of witnesses rather than investigation for purposes of legislation. Appellants sought a declaratory judgment that the Act of Congress establishing the Committee is repugnant to the Constitution, both on its face and by reason of the unconstitutional meaning which has been attributed to it through its enforcement and use by the Committee over the years; an injunction restraining the Committee from enforcing or operating under that Act; a declaratory judgment that the hearings held on May 25-27, 1965 were invalid; and an injunction restraining the Committee from instituting criminal proceedings against appellants for contempt of Congress. (2 A. 3-102; 2 R. 4, pp. 5-127, 141-160.)

In April, 1966, District Judge Hoffman denied appellants' motion that a three-judge court be convened, and granted the Committee's motion to dismiss the second complaint, on the grounds (1) appellants have no standing to maintain the action, (2) the relief available to appellants will not terminate the controversy, (3) the action is barred by the doctrine of separation of powers, and (4) no justiciable case or controversy is presented. (2 A. 117-134.) No claim of immunity under the Speech or Debate Clause was either raised or decided. Appellants' appeal from this ruling was consolidated in the Court of Appeals with the first appeal.*

The Court of Appeals' Ruling

On November 10, 1966, a majority of the Court of Appeals reversed both of the orders of dismissal of the complaints, and remanded with directions that three-judge district courts be convened to hear and determine the cases. (Appendix 3; 3 R. 6.) The court held that the complaints set forth a basis for equitable relief and raised "a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States*, 360 U.S. 109 (1959)." The court contrasted this case with *Barenblatt*, saying, "Here it is alleged that Rule XI, section 18, is unconstitutional as continually interpreted by the Subcommittee to justify the effectual 'pillorying' of plaintiffs and other witnesses." In a footnote, the Court said (371 F.2d 413, 414):

> "Because of the allegations here of the Subcommittee conduct giving an unconstitutional meaning to the statute, this case is distinguished from those where unconstitutional conduct under color of a valid statute is

* Prior to the commencement of the second action, the Committee had moved to dismiss appellants' first appeal on the grounds of mootness, lack of subject matter jurisdiction, and lack of a justiciable controversy. The Court of Appeals denied this motion.

> alleged. *Ex parte Bransford,* 310 U.S. 354 (1940). It is well established that the meaning of a statute must not be derived solely from its abstract terms, 'unrelated to the definite content furnished them by the course of congressional actions.' *Barenblatt* v. *United States,* 360 U.S. 109, 117 (1959)."

The Committee's petition for rehearing *en banc* was denied on February 13, 1967 (two Judges dissenting).*

Issuance of the Court of Appeals' mandate was delayed for over three months on motions of the Committee's counsel while they considered whether to file a petition for writ of certiorari in this Court. No petition was filed, the mandate was issued in May, 1967, three-judge district courts were convened to hear both cases, and the cases were consolidated for trial. (3 R. 7-9.)

The Indictments

In October, 1966, while appellants' appeals were under advisement in the Court of Appeals (and 17 months after the Chicago hearings), a majority of the House of Representatives passed resolutions that the Speaker certify to the United States Attorney in Chicago reports of the Committee as to plaintiffs' refusal to testify before the

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* In the petition for rehearing (pp. 29-34), the Committee raised for the first time the contention that adoption of contempt resolutions by the House of Representatives (referred to below), which occurred while the appeals were under advisement, rendered the case moot. Again no argument was made that the Speech or Debate Clause barred appellants' action.

Committee, in alleged violation of 2 U.S.C. §192.*

On July 18, 1967 (8 months after the House passed the resolutions), appellants were indicted by the grand jury for the Northern District of Illinois under 2 U.S.C. §192. (67 CR 393, 394, 395.)**

Rulings of the Three-Judge Court in the Civil Case

Following return of the indictments, the three-judge court (Judge Hoffman dissenting) reversed the orders previously entered by Judge Hoffman and granted appellants' motions (i) to add the prosecutors as parties defendant, and (ii) to file a supplemental complaint setting forth the indictments and resulting harm which has befallen appellants and their families. In the supplemental

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* 3 R. 12; 112 Cong. Rec. 27495, 27506 (1966). Statements in opposition to the resolutions, signed by thousands of scientists, physicians, lawyers, clergymen and other professional people were presented to the House (112 Cong. Rec. 27462-84 (1966)), and opposition to the Committee on the House floor, both in speech and vote, reached an all time high.

In the vigorous and extended floor debate concerning these resolutions, it was revealed that the Committee had surreptitiously engaged in the practice of compensating its friendly witnesses following the giving of their testimony. (112 Cong. Rec. 27439-62, 27448-9, 27451, 27484-513, A. 5402-3 (1966).)

** The three criminal cases have been consolidated for trial and are pending before Hon. Abraham L. Marovitz. In Judge Marovitz's absence from the country, Hon. Richard B. Austin denied the motion of defendants (appellants in the case at bar) to stay proceedings in the criminal cases pending this appeal. A similar motion is under advisement before the three-judge Court at the time this brief is filed (Sept. 5, 1968).

Pre-trial motions have been filed in the criminal cases, and those motions are now being briefed. Judge Marovitz has set the motions for disposition on October 24, 1968, and the trial for November 12, 1968.

complaint, plaintiffs pray for a permanent injunction restraining prosecution of the indictments. (4 R. 50.)*

Appellees moved to dismiss the complaints as supplemented on multiple grounds, including lack of standing and justiciability, separation of powers, mootness, the ruling of this Court in *Barenblatt* v. *United States,* 360 U.S. 109 (1959), and lack of right to equitable relief to prevent criminal prosecutions. Appellees did *not* include a claim of privilege under the Speech or Debate Clause. After receiving briefs and oral argument (3 R. 31-38; 4 R. 44), the three-judge court *unanimously* denied appellees' motion to dismiss, and directed all appellees to answer the complaint (4 R. 52, Nov. 8, 1967.)

Thereafter, appellees filed answers to the complaints in which many of the material allegations thereof are denied, and affirmative matters are set forth. The answers contain ten affirmative defenses. *The Speech or Debate Clause is not referred to or relied upon in the answers.* (4 R. 56; 5 R. 68.)

The appellees then filed a motion for summary judgment with affidavits in support thereof, the purport of which are that (1) the hearings held in Chicago, Illinois in May, 1965 were duly authorized by the House of Representatives and by the full Committee, and (2) the Committee members and its employees are not responsible

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* In denying appellants' motion to join the prosecutors as defendants, Judge Hoffman stated that ". . . I cannot find that without the [prosecutors], complete relief cannot be accorded [appellants] . . ." Several days later, Judge Hoffman inconsistently denied appellants' motion for a temporary restraining order to prevent presentation of the contempt resolutions to the grand jury on the ground that such an order would be ineffective since the prosecutors were not parties to the case. (4 R. 53 pp. 96, 110-122; see further, 3 R. 39, 4 R. 41-43, 46-49.)

for the divulgence of appellants' names to the press prior to the opening of the hearings. Again no claim of congressional privilege was made. Appellants filed affidavits in opposition with respect to the pre-hearing release of names of subpoenaed witnesses, and the Court took the motion for summary judgment under advisement on briefs. (4 R. 62-63; 5 R. 70-73, 76, 78.)

Appellants served written interrogatories and a motion for production of documents, which the Court took on briefs. (4 R. 55, 59, 64-66; 5 R. 69, 72-73, 77, 80.) On March 1, 1968, the Court unanimously denied appellees' motion to stay discovery pending disposition of the motion for summary judgment, and directed appellees to respond to certain written interrogatories and to produce certain documents commencing April 12, 1968. (5 R. 86.) Appellants then served notice for the taking of the depositions of the Staff Director and two investigators of the Committee. (5 R. 85.)

Thus, with the case almost three years old, the pleadings at issue and discovery under way, the appellees had not interposed (either in the trial court or on appeal) a claim of congressional privilege based on the Speech or Debate Clause of the United States Constitution.*

On April 3, 1968, the Congressional appellees filed a motion to dismiss the complaints "by reason of Article I, Section 6, Clause 1 of the United States Constitution," the Speech or Debate Clause, and each Congressional defendant submitted a "Claim of Privilege and Exemption

* That Clause had not been overlooked however. In the motion to dismiss appellants' first appeal, and in various briefs filed by the Committee, the Speech or Debate Clause was mentioned in a makeweight argument that appellants could not maintain an action for *recovery of damages* against the Congressional appellees.

From Suit." Appellees requested that discovery be stayed pending the ruling on this motion, and prayed for certain other protective orders with regard to pre-trial discovery.

The prosecutor-appellees did not move to dismiss or claim a privilege or exemption from this suit. The Court took these motions under advisement on briefs, and stayed discovery until the end of June, 1968. (5 A. 90-97.)

On June 26, 1968, a majority of the three-judge Court entered summary judgment dismissing appellants' action as to all appellees on the grounds (i) that appellants' action against the Congressional appellees was barred by the Speech or Debate Clause, and (ii) that the action against the prosecutors was "ancillary" to the action against the Congressional appellees. (Appendix 1 to this brief; 5 R. 98.) The majority observed that this Court has never ruled on the issues presented by the motion to dismiss, namely, "whether the legislative immunity provided by the Speech or Debate Clause may be asserted in an action seeking only equitable relief and a declaratory judgment, and in an action brought to redress a deprivation of First Amendment rights." The Court conceded that the Speech or Debate Clause did not deprive the Court of jurisdiction of plaintiffs' action, and that in order for that Clause to protect a legislator, "it must be demonstrated that he is engaged in a legitimate legislative activity." The Court stated that the determination of this question "is more appropriate in a summary judgment setting," and that "we have treated the Claims of Privilege and Exemption from Suit as affirmative defenses to the actions and find, on the defendants' motion for summary judgment, that the Speech or Debate Clause is a complete legal defense to both ac-

tions. In view of the fact that these cases were commenced more than three years ago, the Court will not require amended pleadings or new motions for summary judgment presenting the defense of immunity to the Court. We will treat the motion of the Congressional defendants to stay discovery and dismiss the actions under the pending motion for summary judgment and allow both motions of the Congressional defendants. The relief sought against the Attorney General and the United States Attorney is ancillary to the claims against the Congressional defendants and the actions will be dismissed as to the Attorney General and the United States Attorney."

Thus, because of the unorthodox procedure adopted by the majority, appellants were never afforded an opportunity either to submit counter-affidavits on the question of whether the activities of the Congressional appellees brought them within the scope of the Speech or Debate Clause, or to brief the question of whether summary judgment was appropriate.

In dissent, Circuit Judge Walter J. Cummings, Jr. pointed out:

First, the Speech or Debate Clause was not intended to apply to civil cases involving the constitutionality of legislation, where no monetary damages or other personal relief is sought.

Second, through "belated resort to the Speech or Debate Clause, this Court should not evade the mandate of *Stamler* v. *Willis,* 371 F.2d 413 (7th Cir. 1966), holding that this complaint presents a substantial constitutional question, and that the breadth of Rule XI should be measured against this Committee's conduct over the years . . ."

Third, "... the *Stamler* opinion contemplated that this judicial reexamination was to occur in this proceeding rather than in subsequent criminal proceedings.... these plaintiffs, like those in *Dombrowski* v. *Pfister,* 380 U.S. 479, should be permitted to raise these questions in a civil proceeding not inhibiting the full exercise of their First Amendment rights. They should not have to go through years of criminal litigation as in *Gojack* v. *United States,* 384 U.S. 702, where the defendant had to stand trial twice, was convicted twice, appealed unsuccessfully twice, obtained a new trial from the Supreme Court and finally the dismissal of charges against him in the Supreme Court."

Fourth, "Even more than in *Dombrowski* v. *Pfister, supra,* these plaintiffs are entitled to an adjudication of their civil complaint. There the allegedly overbroad statute was new and had not been judicially construed, so that any threat to free expression might have been obviated *ad limine.* Here it is alleged that the interpretation put on Rule XI during the approximately 30 years of the the Committee's existence exacerbates the overbreadth of the Rule, and it has already been held that plaintiffs' allegations raise a substantial constitutional question *(Stamler* v. *Willis, supra).* Therefore, *Dombrowski* surely requires this Court to permit this civil litigation to proceed."

Fifth, the majority erred in dismissing the action against the prosecutors.

Appellants filed a notice of appeal to this Court under 28 U.S.C. §1253.

SUMMARY OF THE PLEADINGS

The following is a summary of the allegations contained in appellants' two complaints (1 R. 2; 2 R. 4):

The Committee's legislative charter, Rule XI, is so vague and sweeping that it is unconstitutional on its face. Moreover, the course of conduct engaged in by the Committee over the years, including its conduct during the 1965 Chicago hearings, has given a content and meaning to Rule XI which render it repugnant to the First and Fifth Amendments, to the Bill of Attainder Clause (Article I, Section 9, Clause 3), and to Article III of the Constitution.

The Committee has used Rule XI publicly to expose personal opinions and associations of private citizens and groups, particularly those whose economic, political and social philosophies differ from those of a majority of the Committee, and has visited public scorn and obloquy upon those persons and groups, and deterred them and others in the free exercise of their First Amendment freedoms. Many citizens fear the risk of being called before the Committee, and in order to avoid that risk they forego exercise of their rights of freedom of speech, assembly, petition and other rights guaranteed them by the United States Constitution.

The hearings held in Chicago typify the way in which Rule XI has been used by the members of the Committee over the years. Prior to the hearings, the Committee or its agents deliberately released to the news media the names of appellants and other persons subpoenaed to appear before the Committee in May, 1965 in Chicago. The resulting publicity caused great harm to appellants in their professional and private lives and reputations.

The hearings held in Chicago in May, 1965 served no legitimate legislative purpose, since the only testimony received by the Committee was from its two friendly witnesses who had already been heard by the Committee in executive session. Moreover, about one-half of the questions and testimony related to events which allegedly occurred prior to 1960,* and which were so stale and outdated as to be of no assistance to the Committee or the Congress in carrying out a legislative function.

The Committee violated Rule 26(m) of the House of Representatives in refusing to grant executive sessions as to all testimony by or concerning appellants, despite the knowledge of the Committee and its counsel that inquiries would be put to witnesses which were defamatory of appellants, including allegations that they had been active members of the Communist Party.

The subpoenaed witnesses made it clear from the outset that they did not intend to answer the leading and defamatory questions put to them by Committee counsel. Those question did not elicit any information, and served only to bring public embarrassment and scorn upon the witnesses and others who were mentioned in the questions.

The Chicago hearings were conducted in so tumultuous and undignified a manner, and deviated so radically from minimum standards of orderly procedure, that witnesses could not reasonably be expected to attend and answer the Committee's questions.

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* All of the Committee's questions regarding appellants related to alleged pre-1958 events. It is alleged in the complaints that Mrs. Hall was subpoenaed at the instigation of a group of Chicago area property owners who are opposed to her efforts in behalf of Negroes' civil rights.

At the time appellants were called to testify by the Committee, they had not been given any explanation of the purpose of the hearings or why they had been called to testify before the Committee, so that they were unable to determine the thrust of the hearings or relevancy of any question which might be put to them; Mrs. Hall's name had not been mentioned in testimony, and Dr. Stamler had been referred to in a single hearsay reference; appellants had been denied the right to cross examine the Committee's witnesses or to examine the Committee's evidence concerning them; they had been named by Committee counsel in many defamatory but unanswered questions; they had wrongfully been denied executive sessions; and their counsel had been physically abused and threatened.

Great harm has befallen appellants as a result of the Committee's conduct, namely, (1) Dr. Stamler and Mrs. Hall were required to sign unique loyalty oaths in order to retain their employment, (2) threats of violence have been made to Dr. Stamler because of the legal position he took before the Committee, (3) Mrs. Hall's employer has given consideration to whether she should be dismissed from her employment, (4) upon return of the criminal indictments, Dr. Stamler was placed upon inactive non-salaried status by the Board of Health and his salary placed in escrow, and (5) Dr. Stamler's important medical research has been jeopardized as a result of the Committee's activities.

In their answers (4 R. 56; 5 R. 68), appellees deny many of the allegations of appellants' complaints, and they set out the affirmative defenses of lack of jurisdiction of subject matter and parties, adequate remedy in the criminal cases and mootness. In addition, the prosecutors aver that the doctrine of separation of powers renders them immune from the Court's injunctive powers.

In addition to the foregoing pleadings, the parties have filed affidavits regarding appellees' motion for summary judgment, which place at issue the question of whether the Committee was responsible for the pre-hearing release of witnesses' names. (5 R. 70, Items M to P; 5 R. 76, affidavits of appellants, Gutman, Stearns and Shufro.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introduction

This case is in an extraordinary posture. The Court of Appeals for the Seventh Circuit ruled in 1966 that appellants' complaints set forth substantial constitutional questions and present *prima facie* grounds for equitable relief, and directed that three-judge courts be convened to hear the cases. The court held that the Committee's charter, Rule XI, should be read and interpreted in the context of the Committee's conduct over the years, and that this judicial examination should occur in this civil proceeding. (Appendix 3.) The Committee had full opportunity to seek review of this decision in this Court, but did not do so.

In 1967, a majority of the three-judge court convened pursuant to the Court of Appeals' mandate directed that the prosecutors be added as parties defendant, and unanimously rejected a host of grounds submitted in support of the appellees' motion to dismiss the complaints.

Thus, as the case was about to enter its fourth year, the pleadings were at issue and pre-trial discovery was under way. It was at this juncture that, for the first time, the Speech or Debate Clause of the United States Constitution was interposed as a bar to appellants' action against the Congressional appellees.

In June, 1968, without giving appellants an opportunity to submit counter-affidavits, a majority of the three-judge court ruled that the motion to dismiss would be treated as a motion for summary judgment, and dismissed the complaints upon the basis of a novel interpretation of the Speech or Debate Clause, coupled with a ruling that dismissal of the Congressional appellees somehow required dismissal of the prosecutors. Appellants' entire action was abruptly terminated on the eve of trial after more than three years of active and hotly contested litigation involving serious and fundamental federal constitutional issues.

In light of this background, there is justification for Circuit Judge Cummings' charge, in his dissenting opinion, that the majority of the three-judge court "through belated resort to the Speech or Debate Clause" has attempted to evade the mandate of *Stamler* v. *Willis,* 371 F.2d 413 (7th Cir. 1966). Judge Cummings added:

> " . . . this Court has already unanimously denied the Government's motion to dismiss and permitted limited discovery and should not now back-track from the forthright position previously taken merely to avoid passing upon the difficult and weighty questions presented."

The issues tendered by this case go far beyond the personal interests of the three appellants. Those issues involve basic questions of federal constitutional law, not the least of which is whether citizens whose First Amendment rights have allegedly been trammelled by a committee of Congress are entitled, under the principles enunciated by this Court in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), to seek vindication of those rights in a civil rather than a criminal forum. Also involved is the far-reaching question of whether the House Committee on Un-Ameri-

can Activities has so consistently used its charter to pillory witnesses and chill free exercise of First Amendment rights that it has given a meaning to that charter which renders it repugnant to the United States Constitution.

Appellants urge that this Court summarily dispose of this last minute effort to evade the mandate of the Seventh Circuit, and remand the cause for trial on the fundamental issues involved, or in the alternative hold that the Committee's charter is repugnant to the Constitution of the United States (see Part III below).

I.

THE COURT BELOW WAS CLEARLY WRONG IN DISMISSING THIS ACTION AGAINST THE ATTORNEY GENERAL AND THE UNITED STATES ATTORNEY.

The majority of the court below ruled, *sua sponte*, and without having afforded appellants an opportunity to be heard on the issue, that appellants' action against the prosecutors is "ancillary" to their action against the Congressional appellees, and that dismissal of the Congressmen therefore required dismissal of the prosecutors. The court cited no authority whatever, and offered no explanation of the meaning of the word "ancillary" as applied here.

The majority's reason for dismissal of the prosecutors is contradictory of an earlier ruling by the three-judge court. District Judge Hoffman, who wrote the majority opinion below, had ruled in July, 1967 that an injunction against the Congressional appellees would not preclude prosecution of the criminal cases because the order would not bind the prosecutors. It was upon the basis of this very ruling that appellants persuaded the full three-judge

court to reverse Judge Hoffman's denial of the motion to add the prosecutors as parties defendant. Their presence as defendants was necessary to an effective restraint of the prosecution of the indictments.

Accordingly, since the time that the indictments were returned against appellants in July, 1967, the prosecutors have become important and in fact necessary defendants.

In *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), and *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), this Court held that the Speech or Debate Clause barred civil actions for damages against congressmen, but permitted the actions to continue against non-congressional defendants. If the cause of action in *Kilbourn* against the House Sergeant at Arms was not "ancillary" to the suit against the congressmen, and if the cause of action in *Dombrowski* against Committee counsel Sourwine was not "ancillary" to the suit against Senator Eastland, then by the same token appellants' causes of action against the United States Attorney and the Attorney General are not "ancillary" to their suits against the members of the Committee.

Moreover, the prosecutors did not claim protection under the Speech or Debate Clause; nor did they join in the motion to dismiss made by the Congressional appellees in April, 1968; nor did the majority of the court below seek to justify dismissal of the prosecutors on the Speech or Debate Clause or any other privilege.

The majority's only justification for dismissal of the action against the prosecutors was the *sua sponte* and wholly unsupported and unexplained "ancillary" concept. Therefore, unlike *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), and *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880),

this case involves no question of whether the privilege created by the Speech or Debate Clause immunizes the prosecutors, as non-members of Congress, from appellants' suit.

A judgment against the prosecutors — with or without the Congressional appellees as parties — can afford appellants all of the relief they request, including a declaratory judgment that Rule XI is unconstitutional, and an injunction restraining prosecution of the criminal cases pursuant to the principles expressed in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) and *Ex Parte Young*, 209 U.S. 123 (1908); see also *Reed Enterprises* v. *Corcoran*, 354 F.2d 519 (D.C. Cir. 1965); *United States* v. *Wood*, 295 F.2d 772 (5th Cir. 1961).

The majority of the court below was clearly wrong in ruling that appellants' action against the prosecutors is "ancillary" to their action against the Congressional defendants and therefore must be dismissed if the Congressional appellees are immunized from suit by the Speech or Debate Clause.

The three-judge court has already determined that appellants' complaints set forth a valid cause of action against the Attorney General and the United States Attorney. The judgment dismissing appellants' complaints as to the prosecutors should be reversed and the cause remanded to the three-judge court with directions that the case proceed to trial.

II.

THIS APPEAL PRESENTS NOVEL AND IMPORTANT ISSUES REGARDING THE SPEECH OR DEBATE CLAUSE OF THE UNITED STATES CONSTITUTION.

A.

The Speech Or Debate Clause Was Not Intended To Prohibit A Civil Action Against Congressional Defendants Wherein the Plaintiff Does Not Seek Damages Or Other Personal Relief Against the Defendants, But Rather Asks the Court To Adjudicate the Constitutionality of An Act of Congress Which the Congressional Defendants Are Enforcing.

This Court has held that the Speech or Debate Clause prohibits civil suits for damages against members of Congress where the plaintiff's cause of action arises out of legitimate legislative activities. *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967). The Court has never *expressly* ruled, however, upon the question whether that clause precludes civil actions, such as the case at bar, in which the plaintiff seeks a declaratory judgment as to the constitutionality of an Act of Congress, injunctive relief against members of Congress and other officials who are enforcing the Act, but does not seek damages or any other personal relief.

Several recent decisions of this Court lend strong support to the view expressed by Circuit Judge Cummings in his dissenting opinion (Appendix 1) that the Clause is inapplicable in cases such as this. *Bond* v. *Floyd,* 385 U.S. 116 (1966), and *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965)

were suits in which this Court awarded declaratory judgments and injunctive relief against members of state legislatures. See also *Bush* v. *Orleans Parish School Board,* 191 F.Supp. 871 (E.D. La. 1961), aff'd. 367 U.S. 908.* It would be impertinent to suggest that the members of this Court were unaware of, overlooked, or intended impliedly to overrule the holding of *Tenney* v. *Brandhove,* 341 U.S. 367, 372-376 (1951) that state legislators are protected by a common law privilege from civil suits commensurate with that afforded federal congressmen by the Speech or Debate Clause. Likewise it would be impertinent to suggest that in those cases the attorneys for the defendant-legislators failed to assert a complete defense available to their clients.

There is a simple explanation as to why this Court and the defendants in those cases did not assert that the legislative privilege of the Speech or Debate Clause was a bar to suit. It is the same reason why, for almost three years, the Congressional appellees in the case at bar made no claim of privilege—the privilege was not intended and (until the decision of the court below was rendered) has never been held to preclude equity actions involving the constitutionality of legislation, in which no personal relief is sought against the legislator-defendants.**

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* Lower federal courts too have granted equitable relief against state legislators. *Jordan* v. *Hutcheson,* 323 F.2d 597 (4th Cir. 1963); *Liveright* v. *Joint Committee,* 279 F.Supp. 205 (M.D. Tenn. 1968).

** In *Powell* v. *McCormack,* 395 F.2d 577 (D.C. Cir. 1968), petition for certiorari pending No. 138, Judge Berger stated "it would seem that, although we need not decide," the Speech or Debate Clause barred an action to require the House of Representatives to seat an elected member. (395 F.2d at 602.) This dictum was not concurred in by the other two members of the court. *Powell* is inapposite in any event because the plaintiffs in that case sought a mandatory injunction to require members of the House to seat Powell.

Upon the basis of a general dictum in *Tenney,* the majority of the court below held that the Speech or Debate Clause was intended to protect members of Congress from having to retain counsel to defend *any kind* of civil action in which legislative activities are involved. But as Circuit Judge Cummings observed in his dissenting opinion, the Committee members are entitled to have government counsel defend them in cases such as this — as was done in the case at bar — under 2 U.S.C. §118. They therefore run no risk of personal cost of suit or of personal liability.

The Speech or Debate Clause has its roots in English history. Its purpose was to enhance and further legislators' freedom of action by prohibiting suits in which they might be held liable, civilly or criminally, for their legislative activities. This salutary purpose will not be impinged upon by permitting litigation concerning the constitutionality of legislation, in which government attorneys represent the legislators without charge, and in which there is no risk of personal liability on the part of the legislators.

In *Kilbourn* and *Tenney,* this Court relied in part on the Massachusetts case of *Coffin* v. *Coffin,* 4 Mass. 1 (1808), in which the Supreme Judicial Court of Massachusetts construed that state's constitutional Speech or Debate Clause. That same court recently passed upon the issue now before this Court. In assessing this decision, it should be noted that the Massachusetts constitutional provision is broader than the federal Speech or Debate Clause. In *Luscomb* v. *Bowker,* 334 Mass. 468, 136 N.E.2d 192 (1956), plaintiff was named as a member of the Communist Party in a report about to be filed by a Massachusetts legislative commission formed under a charter

similar to Rule XI. Plaintiff brought suit against the members of the commission for a declaratory judgment and injunctive relief to expunge the report and to prevent its publication. After discussing *Kilbourn, Tenney, Coffin* and other cases, the court said (136 N.E.2d at 197):

> "In none of the authorities above cited do we find any support for the proposition that a member of the legislature is exempt from suit by an individual designed to test the constitutionality of action of the legislator."

Members of the other branches of government have no sweeping privilege such as that created for legislators by the Court below. For example, the executive branch has an absolute privilege from civil damages suits arising from official action. *Barr* v. *Matteo*, 360 U.S. 564 (1959). But that privilege has never been held to bar actions against high-ranking executive officers for declaratory judgment to determine the constitutionality of the act under which the officer is acting, or the legality of his conduct, and for appropriate injunctive relief.*

Similarly, the judiciary has long been held to enjoy a broad immunity from civil damage suits. *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Pierson* v. *Ray*, 386 U.S. 547 (1967). This immunity, however, has not been held to preclude courts from adjudicating the validity of judicial action and granting affirmative relief in mandamus actions in which the judge himself is the defendant. E.g., *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

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* E.g., *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), (Secretary of State); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (Attorney General of the United States); *Currin* v. *Wallace*, 306 U.S. 1 (1939) (Secretary of Agriculture); *Zemel* v. *Rusk*, 381 U.S. 1 (1965) (Secretary of State); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (Secretary of Commerce).

The holding of the majority of the court below, if accepted, would seriously undermine the rule of *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803) that federal courts have power to determine whether legislation of the Congress is consistent with the Constitution. The federal courts' jurisdiction to exercise that power is not vitiated because the persons who are enforcing the legislation, and who therefore are proper defendants in a civil action to enjoin enforcement of the legislation, happen to be members of Congress.

By granting immunity to the Committee members, and dismissing the prosecutors as well, the court below has remitted appellants to their defenses in the pending criminal cases and deprived them of the opportunity of obtaining relief in a civil forum under the principles of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). Those salutary principles have thereby been stultified by the ruling of the majority below. This Court has recognized that defense of a criminal case may not insure vindication of First Amendment rights, and that the criminal judgment often does not resolve the basic issues. *Baggett* v. *Bullitt,* 377 U.S. 360, 378 (1964); *Dombrowski* v. *Pfister,* 380 U.S. 479, 490-491 (1965). Even the successful defense of a criminal prosecution may be inadequate to protect First Amendment rights. Compare *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 284 (1961). Appellants are entitled to an adjudication of the merits of their claim (which the court below unanimously upheld against a previous motion to dismiss) that they are entitled to relief in this civil case rather than having to defend the criminal indictments.

We respectfully submit that the Court should note jurisdiction to resolve the novel and substantial question presented here as to the application of the Speech or Debate Clause in cases such as this.

B.

Entry of Summary Judgment Was Erroneous Because (1) There Is An Issue As To Whether the Activities of the Committee Members Were Legitimate Legislative Activities So As To Bring Them Within the Protection of the Speech Or Debate Clause, (2) The Committee Members Waived Any Privilege or Exemption From Suit Afforded Them By The Clause, and (3) Appellants Were Improperly Deprived of the Right To Submit Affidavits In Opposition To Appellees' Motion.

Even if it is assumed, *arguendo,* that the Speech or Debate Clause is applicable in cases such as this, there is presented on this record the question whether the court below correctly entered summary judgment for the Congressional appellees (and perforce for the prosecutors).

(1)

The majority of the court below erred by ignoring the issue of fact as to whether the activities of the Congressional appellees, upon which this action is based, are within the purview of the Clause which protects legislators while "acting in the sphere of legitimate legislative activity." *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951).

Thus, the Speech or Debate Clause does not afford limitless license to members of Congress. The boundaries of the privilege are established by the courts, not the legisla-

ture, as this Court said in *Tenney* v. *Brandhove,* 341 U.S. 367, 376-7 (1951):

> ". . . The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby* v. *White,* 2 Ld. Raym. 938, 3 id. 320. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. [Citing cases.]"

Neither does the power of Congress to conduct investigations grant a *carte blanche* to legislators. As Mr. Justice Brennan said in *Hutcheson* v. *United States,* 369 U.S. 599, 624 (1962) (concurring opinion):

> ". . . Investigation conducted solely to aggrandize the investigator or punish the investigated, either by publicity or by prosecution, is indefensible—it exceeds the congressional power: exposure for the sake of exposure is not legislative inquiry."

In *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), this Court held that summary judgment was improperly entered in favor of counsel to a legislative committee against whom damages were sought. There, as here, a genuine issue of fact existed as to whether the conduct in question was protected by the privilege, hence the plaintiffs were entitled to go to trial on that issue. (387 U.S. at 84-85.)*

The Court of Appeals for the Fifth Circuit reached the same conclusion in a related case, *Pfister* v. *Arceneaux,* 376 F.2d 821 (5th Cir. 1967), a civil action for injunctive relief and for damages brought against members of a state legislative investigating committee (376 F.2d at 823):

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* As to the Congressional defendant, Senator Eastland, the Court found no genuine fact issue: "The record does not contain evidence of his involvement in any activity that could result in liability." (387 U.S. at 84.)

> ". . . Resolution of this issue i.e., whether Pfister made such a statement and whether it was accurate has a serious bearing on the question whether Pfister and the other members of the committee were 'acting in the sphere of *legitimate* legislative activity', which would entitle them to immunity." (Emphasis the Court's.)

Similarly, in the case at bar, the disputed issues of fact concerning the course of conduct engaged in by members of the Committee have a bearing upon whether they were engaged in legitimate legislative activity which entitled them to immunity. See also *Wheeldin* v. *Wheeler*, 373 U.S. 647, 650-1 (1963), dealing with an investigator for the Committee, and *Hughes* v. *Johnson*, 305 F.2d 67, 70 (9th Cir. 1962), dealing with immunity from liability of federal game wardens.

The complaints aver that the activities of the Committee members pursuant to Rule XI were *not* legitimate legislative activities, and had no legislative purpose, but rather were unlawful acts which resulted in pillorying of and injury to witnesses, and a chilling of free exercise of First Amendment rights by the entire citizenry. The appellees denied these allegations, thus placing them in issue. There are no affidavits directed to this point. These pleadings create a fact issue which cannot be determined without trial. The majority of the court below concedes this to be true, saying:

> " . . . These exhibits [filed by the appellees] do not disprove plaintiffs' allegations that the conduct of the Committee gives an unconstitutional gloss to House Rule XI . . . "

The kinds of extraordinary activity pursued by this Committee since its inception defy summary description. Under cover of a paper-thin facade of legality—which has been paid greater lip service since *Watkins* v. *United*

States, 354 U.S. 178 (1957) — the Committee fulfills no legitimate legislative function, and instead assumes the role of the official exposer of supposedly "subversive" persons, ideas and organizations, and as a grand jury inquiring into and deciding political orthodoxy. Exposure and pillorying — of people, ideas and groups — is an end in itself, and the only real end of the Committee's hearings.* The legislative product of the Committee's labors is miniscule; it is summarized in Appendix 4, pp. 148 to 154. But the injury worked by the Committee upon witnesses and their families, upon organizations of citizens, and upon the free flow of ideas in this country, is incalculable. So that the Court will know this is not mere rhetoric or hyperbole, we have set out in Appendix 4, specific examples of reprehensible Committee conduct during hearings conducted in the past 20 years, as well as reports of the harm done to citizens of this country by the unlawful course of the Committee's conduct.

In addition, appellants have commissioned a scientific sampling of the official transcripts of the 174 hearings held by the Committee from 1946 through 1967. The study was conducted by Hans Zeisel, Professor of Law and Sociology of the University of Chicago Law School, who is a world renowned expert in this field. The preliminary results of the study are set forth in full in Appendix 5. Three conclusions stand out:

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* ". . . Lacking these casualties, the people whose reputations and livelihoods have been blithely hazarded, the Committee's career would lack meaning. They are its achievement. It has established a record not of laws but of Fifth Amendment pleas and contempt citations and disrupted lives. The proudest exhibit of the Committee's thirty years is its spacious files filled with the names, associations, activities, and public utterances of thousands of Americans." Goodman, *The Committee* (Farrar, Straus and Giroux, 1968), p. 493.

First, the Committee has obtained virtually no information concerning "subversive" and "un-American" activities from the more than 2,000 non-Committee witnesses called before it.*

Second, thousands of pages of the Committee's transcripts are devoted to Committee counsel and members of the Committee putting long series of leading, defamatory and accusatory questions to non-Committee witnesses, which the witnesses repeatedly refuse to answer.

Third, almost 90% of the questions put to unfriendly witnesses (most of which went unanswered) relate to the witnesses' political, social and economic views, associations and activities, as distinguished from criminal or unlawful conduct.

These conclusions become even more striking when one considers that the Committee's own "friendly" witnesses, almost without exception, have given their testimony to the Committee in executive session before being called in public.

The ultimate conclusion from these facts is, as charged in appellants' complaints, that *the Committee is not engaged in any legitimate legislative investigation, but rather has and is engaged in a process of public exposure and pillorying of citizens whose political, social and economic beliefs are deemed "subversive" by the Committee.* The harmful effects of this misguided course of conduct upon the free exercise of First Amendment rights by our citizens is incalculable.

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* Apart from the 1966 Ku Klux Klan hearings, only 3% of all questions dealing with alleged misdeeds elicited positive information that was not more than 5 years old. (Appendix 5, p. 23; computation based on Table 17.)

The majority of the court below asserted that "plaintiffs challenge the motive of the defendants." The short answer is found in Judge Cummings' dissent:

> ". . . It is the effect of their conduct that is at issue here, not their motives."

The Speech or Debate Clause does not shield members of Congress from judicial scrutiny into unlawful conduct. Appellants are prepared to prove the Committee's continued course of unlawful conduct, and to introduce testimony of witnesses concerning the obloquy visited upon citizens and injury done our cherished rights by the actions of this purportedly legislative body. The issues of fact thus raised should be heard and disposed of by the court below before any determination is made regarding application of the Speech or Debate Clause.

(2)

Appellants Stamler and Hall adopt the position of appellant Cohen in Part III of the Jurisdictional Statement filed by him in this Court, that is, the Congressional appellees have waived any right or privilege afforded them by the Speech or Debate Clause.

(3)

We have summarized above how the majority below treated the Congressional appellees' motion to dismiss as a motion for summary judgment, without first affording appellants an opportunity to submit counter affidavits in accordance with the procedure established by F.R.C.P. 56(c). The unfair procedure adopted by the majority, without prior notice to appellants, does not meet the requirements of either the Federal Rules of Civil Procedure or the Due Process Clause. *Erlich* v. *Glasner*, 374 F.2d 681, 683 (9th Cir. 1967).

It is ironic that the court's reason for depriving appellants of their right to be heard is that "These cases were commenced more than three years ago." The age of the cases and the vast amount of time, effort and expense put into them by the courts, the parties and counsel would seem to call for careful adherence to orderly procedures, rather than precipitous dismissal of the case without affording appellants an opportunity to be heard.

At the very least the judgment appealed from should be reversed with directions that appellants be given an opportunity to submit counter affidavits to demonstrate that the conduct complained of on the part of the Committee was not legitimate legislative activity, and therefore is not immunized by the Speech or Debate Clause.

III.

IF PLENARY CONSIDERATION IS GIVEN TO THIS CASE, THE COURT SHOULD REVIEW THE IMPORTANT QUESTION OF WHETHER THE COMMITTEE'S CHARTER IS UNCONSTITUTIONAL ON ITS FACE.*

The Act of Congress which established the Committee was enacted in 1946 as a part of the Legislative Reorganization Act (60 Stat. 812, 828, Rule XI, 18(b)):

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic

* The Court accepted this issue for review by its unlimited grant of certiorari in *Gojack* v. *United States*, 384 U.S. 702 (1966), but reversed on another ground.

origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.''

Regarding this enactment, this Court said in *Watkins* v. *United States,* 354 U.S. 178, 202 (1957):

> ''It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of 'un-American'? What is that single, solitary 'principle of the form of government as guaranteed by our Constitution'?''

A.

The Vagueness of the Rule Chills Citizens in the Exercise of First Amendment Rights.

In *Barenblatt* v. *United States,* 360 U.S. 109 (1959), by a 5 to 4 vote, this Court upheld Rule XI against a charge of vagueness, holding that the Committee's activities over the years had shown that ''the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country'', and that Rule XI, as applied to investigation of Communist influences in education, is not so vague as to deny adequate notice and due process.* (360 U.S. at 118.)

Since *Barenblatt,* however, a new understanding of the vice of vagueness in the First Amendment area has evolved under which the Court has declared unconstitutional many statutes like Rule XI whose vagueness ''chills'' the exer-

* In *Barenblatt,* the vagueness attack was not couched in First Amendment terms. As the Court there said, "What we deal with here is whether petitioner was sufficiently apprised of 'the topic under inquiry' thus authorized 'and the connective reasoning whereby the precise questions asked relate[d] to it'." (360 U.S. at 124).

cise of First Amendment rights of citizens.*

Should the Court direct oral argument in this appeal, the issue of facial constitutionality of Rule XI should be re-examined in light of these post-*Barenblatt* decisions.

The controlling principles are expressed in *NAACP* v. *Button* and *Baggett* v. *Bullitt*:

> " . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.
>
> * * *
>
> " . . . Broad prophylactic rules in the area of free expression are suspect. [Citations omitted.] Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (371 U.S. at 432-33, 438.)
>
> "We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker— teachers and public servants— to 'steer far wider of

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* *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961) (Florida loyalty oath statute); *NAACP* v. *Button*, 371 U.S. 415 (1963) (Virginia anti-solicitation statute); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) (Washington State loyalty oaths); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) (Louisiana statutes dealing with subversion and Communism); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966) (Arizona State employee loyalty oath statute); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) (New York teacher loyalty oath statute); *Whitehill* v. *Elkins*, 389 U.S. 54 (1967) (Maryland teacher loyalty oath statute).

> the unlawful zone,' *Speiser* v. *Randall*, 357 U.S. 513, 526, than if the boundaries of the forbidden areas were clearly marked." (377 U.S. at 372.)

"Granting the vagueness of the Rule," the then majority of the Court in *Barenblatt* nevertheless held that because Rule XI had been interpreted by the Committee as applying at least to Communists, it was not vague as to Communists and could constitutionally be applied to them. (360 U.S. at 117-121.) However, this holding has been seriously undermined by the cases just discussed, and in particular by the holding in *Whitehall* v. *Elkins*, 389 U.S. 54 (1967). In *Whitehill*, this Court applied the newly formulated principles and held that a limited and definite intepretation—such as the interpretation which the *Barenblatt* majority attributed to Rule XI—will not cure an overly broad and vague statute in the First Amendment area. In striking down a Maryland teacher's oath statute despite restrictive state interpretations of the words "overthrow, destruction or alteration of the constitutional form of government . . . by revolution, force or violence" and "membership in a subversive organization,"* this Court said (389 U.S. at 59-60, 61-62):

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* Compare the similar phraseology of Rule XI, quoted above. The Committee itself recognizes the deficiencies of its charter, and has proposed a drastically revised charter. Supporting the adoption of the proposed revision, Rep. Ichord, a member of the Committee, addressed the House on July 19, 1968, as follows:

> "Admittedly [Rule XI] is extremely vague and ambiguous.
>
> * * *
>
> "Why become bogged down in argument and legal battles over whether activities are American or un-American when more precise language can be used." 114 Cong. Rec. H7092-3 (daily ed. July 19, 1968). (See also remarks of Rep. Ashbrook, 114 Cong. Rec. H6314-5 (daily ed. July 10, 1968).)

> "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom.
>
> * * *
>
> "The lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find overbreadth that makes possible oppressive or capricious application as regimes change."

The principles laid down in these cases apply with full force to Rule XI.* Not only is violation of Committee subpoenaes punishable criminally, but receipt of and compliance with a Committee subpoena together with the attendant publicity and disruption of personal life constitutes a severe sanction. (See Appendix 4.) To avoid suffering those sanctions, citizens may be expected to tailor their conduct to "steer far wider of the unlawful zone," and, for fear of the consequences, to cease to engage in conduct which is *not* within the legitimate purview of the investigating committee, but which is nevertheless relentlessly "exposed" by the Committee. The upshot is a chill on freedom of expression and association and the diminution of vigorous debate on political, economic and social issues. To paraphrase *Keyishian,* " . . . the uncertainty as to the scope of [Rule XI's] proscriptions make it a highly efficient *in terrorem* mechanism." (385 U.S. at 601.)

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*As Justice Brennan recently said concurring in *United States* v. *Robel,* 389 U.S. 258, 275 (1967):

> ". . . the numerous deficiencies connected with vague legislative directives, *whether to a legislative committee,* to an executive officer, to a judge and jury or to private persons are far more serious when liberty and the exercise of fundamental rights are at stake." (Citations omitted, emphasis added.)

B.

Rule XI Is Couched In Such Broad Terms That It Encompasses Areas Which Extend Beyond The Investigatory Powers of Congress.

Even assuming that Rule XI could be given a meaning which precisely defines its scope, that scope is so broad as to include subjects of investigation upon which the Congress could not properly legislate. Therefore, the Rule offends the First Amendment.

Rule XI on its face authorizes the Committee to investigate "un-American" and "subversive" "propaganda" and "propaganda activities." It thus sanctions inquiries into political beliefs and associations, pure and simple. The majority in *Barenblatt* recognized this broad sweep, but nevertheless held (360 U.S. at 127-8):

> "That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable.
>
> "[T]his Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. [Citing cases] . . . this Court has recognized the close nexus between the Communist Party and violent overthrow of government."

However, under this Court's recent and controlling decisions — rendered since *Barenblatt* — political beliefs and associations alone, including Communist Party membership, may not be regulated, proscribed or punished absent a setting of *acts* which might be regulated. Accordingly, the sweeping inquiry authorized by Rule XI, even when

directed to Communist Party membership, can serve no legislative interest which counterbalances the strong interest of citizens in the protection of their First Amendment freedoms.

In *Schneider* v. *Smith,* 390 U.S. 17 (1968), this Court denied that the Congress had attempted to give the President authority to "probe the reading habits, political philosophy, beliefs, and attitudes on social and economic issues of prospective seamen on our merchant vessels." By way of contrast, the Court stressed that the statute relating to prevention of sabotage in the maritime industry speaks in terms of "actions", not beliefs or associations. (390 U.S. at 24-27.)

In *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), this Court held unconstitutional a New York statute (previously upheld in *Adler* v. *Board of Education,* 342 U.S. 485 (1952)), making Communist Party membership *prima facie* evidence of disqualification to teach in public schools. Citing *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966) and *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964), the Court said (385 U.S. at 606):

> "... mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants."

In *United States* v. *Robel,* 389 U.S. 258 (1967), this Court struck down as violative of the First Amendment a provision making it criminal to be employed in a defense facility while a member of the Communist Party. "The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it. . . . That statute casts its net across a broad range of associational activities, indiscrimi-

nately trapping membership which can be constitutionally punished and membership which cannot be so proscribed." (389 U.S. at 265-66.)

See also, *United States* v. *Brown,* 381 U.S. 437, 456 (1965), holding that Communist Party members cannot be presumed to be likely to engage in political strikes, thus limiting *American Communication Workers Ass'n.* v. *Douds,* 339 U.S. 382 (1950); *Shelton* v. *Tucker,* 364 U.S. 479, 485-90 (1960); *United States* v. *Rumely,* 345 U.S. 41, 46-47 (1953).

These recent decisions cast grave doubt upon the validity of Rule XI as written. If plenary consideration is accorded this case, this important question should be resolved.

C.

Rule XI Is a Bill of Attainder.

The Bill of Attainder Clause prohibits legislative punishment without a judicial trial. *United States* v. *Brown,* 381 U.S. 437, 447 (1965); *Cummings* v. *Missouri,* 71 U.S. (4 Wall) 277, 323 (1866); *United States* v. *Lovett,* 328 U.S. 303, 315 (1946).

Recently, this Court injected new scope and meaning into the Bill of Attainder Clause, in *United States* v. *Brown,* 381 U.S. 437 (1965) (Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 barring Communists from union office held unconstitutional). The Court severely limited its previous decision in *American Communications Workers Ass'n.* v. *Douds,* 339 U.S. 382 (1950), and made it clear that the Bill of Attainder Clause should be given a liberal interpretation "in light of the evil the Framers sought to bar: legislative punishment,

of any form of severity, of specifically designated persons or groups." (381 U.S. at 447.) The Court pointed out that the Bill of Attainder Clause was intended to limit legislators "to the task of rule making" and to prevent them from carrying out the rules by imposing punishment. (381 U.S. at 445, 446.)

Rule XI has consistently been used to inflict punishment upon particular persons or groups without the benefit of judicial trial. Throughout its existence, the practices of the Committee have had a demonstrably unfavorable effect upon the lives of those it has chosen as its victims. (Appendix 4 to this brief.)

The gross mistreatment of appellants and the other subpoenaed witnesses at the 1965 Chicago hearings, summarized above, exemplifies the Committee's misconduct over the years, and its practice of imposing severe punishment without due process of law or the protections afforded by the judiciary.

Although this Court has not yet ruled upon the issue, three members of the Court expressed the opinion in *Barenblatt* v. *United States,* 360 U.S. 109 (1959), that Rule XI *is* a Bill of Attainder (360 U.S. at 153-4, 162, dissenting opinion). This issue should be addressed and resolved if plenary consideration is given this case.

D.

Rule XI Is Unconstitutional In That The Committee Purports To Act As A Grand Jury With Investigatory And Inquisitorial Powers.

It is a fundamental constitutional principle that legislative committees may not exercise the investigatory powers of grand juries, which are in their nature judicial. In

Kilbourn v. *Thompson,* 103 U.S. 168 (1881), a landmark case limiting the extent of congressional investigatory powers, this Court said (103 U.S. at 192):

> "In looking to the Preamble and Resolution under which the committee acted, before which Mr. Kilbourn refused to testify, we are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial."

The *Kilbourn* case was summarized as follows by the Chief Justice in *Watkins,* 354 U.S. 178, 194 (1957):

> ". . . The Court found that the subject matter of the inquiry was 'in its nature clearly judicial and therefore one in respect to which no valid legislation could be enacted.' The House had thereby exceeded the limits of its own authority."

The Committee has assumed unto itself judicial and grand jury powers, by investigating alleged past nonconformist beliefs, deeds and associations of private citizens and groups, having no conceivable relationship to proposed legislation. This the Committee cannot do, nor may Congress authorize such investigations.

CONCLUSION

Plaintiffs-appellants respectfully submit that the issues presented herein are substantial, and that this Court should reverse the judgment below either summarily or after plenary consideration.

Respectfully submitted,

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